

Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment

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I. Introduction

1. The present report is the third report submitted to the General Assembly by the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, Sir Nigel Rodley, pursuant to General Assembly resolution 55/89 and Commission on Human Rights resolution 2001/62. As in previous years, this report contains issues of special concern to the Special Rapporteur, in particular overall trends and recent developments.

2. The Special Rapporteur would like to draw the attention of the General Assembly to his report to the Commission on Human Rights, in which, in view of the forthcoming World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, he addressed the question of racism and related intolerance, which he believes is all too relevant to issues falling within his mandate.¹ He would like to remind Governments that, in the report he submitted last year to the General Assembly, he addressed the following issues: gender-specific forms of torture; torture and children; torture and human rights defenders; reparation for victims of torture; and torture and poverty (A/55/290).

II. Issues of special concern to the Special Rapporteur

A. Intimidation as a form of torture

3. The Special Rapporteur takes note with appreciation of the reference to intimidation in Commission on Human Rights resolution 2001/62, entitled "Torture and other cruel, inhuman or degrading treatment or punishment". In paragraph 2, the Commission "condemns all forms of torture, *including through intimidation*, as described in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (emphasis added). As stated by the Human Rights Committee in its General Comment No. 20 (10 April 1992), on article 7 of the International Covenant on Civil and Political Rights, the Special Rapporteur would like to remind Governments that the prohibition of torture relates not only to acts that cause physical pain but also

to acts that cause mental suffering to the victim, such as intimidation and other forms of threats.

4. A number of decisions by human rights monitoring mechanisms have accordingly referred to the notion of mental pain or suffering, including suffering through intimidation and threats, as a violation of the prohibition of torture and other forms of ill-treatment. In particular, the Special Rapporteur would like to draw Governments' attention to the views expressed by the Human Rights Committee in the case of *Estrella v. Uruguay*. The alleged victim, Miguel Angel Estrella, the renowned Argentinean concert pianist, complained of having, *inter alia*, been threatened with death, mock amputation of his hands with an electric saw and violence to his relatives or friends. The Committee concluded that the applicant had been subjected to severe psychological torture, in an effort to force him to admit subversive activities. The treatment had lasting effects, particularly to his arms and hands. Indeed, he suffered a loss of sensitivity in both arms and hands for 11 months and discomfort that persisted for years in the right thumb.

5. Similar interpretations of the prohibition of torture have been made with respect to the relevant provisions to be found in international humanitarian law. Article 4 of the 1977 Protocol Additional to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflict (Protocol II) prohibits at any time and in any place whatsoever "(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment" ... and "(h) threats to commit any of the foregoing acts". The Special Rapporteur would like to draw Governments' attention to the Commentary on the Geneva Conventions and Protocol II published by the International Committee of the Red Cross, which states with respect to subparagraph (h) of article 4: "This offence concludes the list of prohibited acts and enlarges its scope. In practice threats may in themselves constitute a formidable means of pressure and undercut the other prohibitions. The use of threats will generally constitute violence to mental well-being within the meaning of subparagraph (a)." Similarly, article 13 of the Third 1949 Geneva Convention relative to the Treatment of Prisoners of War states that "... prisoners of war must at all times be protected, particularly against acts of violence or intimidation and

against insults and public curiosity" and considers the violation of such obligation a serious breach to the Convention. The ICRC Commentary refers to the fact that the protection extends to moral values, such as the moral independence of the prisoners, or protection against acts of intimidation. With respect to interrogation, article 17 (Beginning of captivity) of the same Convention provides that "no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind."

6. The Special Rapporteur notes that he mainly receives communications regarding acts that cause physical pain or suffering or regarding persons at risk of being subjected to those acts. He will, of course, continue to react vigorously to that kind of violation of the prohibition of torture. Nevertheless, he notes that information on threats and intimidation a person may have been subjected to, especially while in the hands of law enforcement officials, is an often crucial element in assessing whether the person is at risk of torture and other forms of ill-treatment.

7. After his visit to Azerbaijan, the Special Rapporteur reported that it was believed by so many detainees he had met during the mission that torture was automatic that the mere threat or hint of adverse consequences for failure to comply with investigators' wishes (such as to sign a confession) was assumed to mean torture. For some, the mere fact of detention had the same implication. Furthermore, the Special Rapporteur noted that the investigative authorities frequently did nothing to dispel this association. The Special Rapporteur pointed out that the fear of physical torture may itself constitute mental torture.² The Special Rapporteur also referred in several of his mission reports to the fact that the absence of marks on the body that would be consistent with allegation of torture should not necessarily be treated by prosecutors and judges as proof that such allegations are false.³ In that respect, he called for the judiciary to be made more aware of other forms of torture, such as intimidation and other threats.

8. It is the Special Rapporteur's opinion that serious and credible threats, including death threats, to the physical integrity of the victim or a third person can amount to cruel, inhuman or degrading treatment or

even to torture, especially when the victim remains in the hands of law enforcement officials. He remains alert to the problems posed in respect of securing evidence of non-physical forms of torture.

B. Enforced or involuntary disappearance as a form of torture

9. The Special Rapporteur would like briefly to take stock of the situation in respect of acts of enforced disappearance, since the jurisprudence of several international human rights monitoring mechanisms has referred to the prohibition of torture while dealing with such acts.

10. As stated in article 1 of the Declaration on the Protection of all Persons from Enforced Disappearance,⁴ any act of enforced disappearance⁵ "constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life." Similarly, the Working Group of the Commission on Human Rights on Enforced or Involuntary Disappearances acknowledged, in its third report to the Commission, that enforced disappearance itself constitutes ipso facto torture and other prohibited ill-treatment. It stated that: "the very fact of being detained as a disappeared person, isolated from one's family for a long period is certainly a violation of the right to humane conditions of detention and has been represented to the Group as torture."⁶ The issue of enforced disappearances is thus all too relevant to the mandate of the Special Rapporteur, who would like to take this opportunity to remind the General Assembly of the links between these two serious human rights violations, in particular in the light of findings of other human rights mechanisms.

11. The Committee against Torture has often expressed concern over practices of enforced disappearance while reviewing periodic reports submitted in accordance with article 19 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.⁷ Similarly, the Human Rights Committee concluded while reviewing individual complaints, that enforced disappearances may amount to torture and other forms of ill-treatment

of the disappeared. The Special Rapporteur notes in the case of *El-Megreisi v. Libyan Arab Jamahiriya* that the Committee concluded "... from the information before it, that Mohammed El-Megreisi was detained incommunicado for more than three years, until April 1992, when he was allowed a visit by his wife, and that after that date he has again been detained incommunicado and in a secret location. Having regard to these facts, the Committee finds that Mr. Mohammed Bashir El-Megreisi, by being subjected to prolonged incommunicado detention in an unknown location, is the victim of torture and cruel and inhuman treatment, in violation of articles 7 and 10, paragraph 1, of the Covenant."⁸ While the Special Rapporteur notes that the term "disappearance" was not used by the Committee, presumably because the fact of detention and its substantial duration had been confirmed before the case even reached the Committee, he believes that what appears to have been enforced disappearance, is justifiably described by the Committee as torture.⁹

12. The Special Rapporteur also notes that, in article 1, the Declaration states that any act of enforced disappearance inflicts severe suffering on the victims and their families and in the fifth preambular paragraph refers to the anguish and sorrows caused by those disappearances. The Special Rapporteur would like to emphasize that the working definition of "disappearance" refers also to the refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty.¹⁰ This is an intentional act directly affecting close family members. Being fully aware they are hurling family members into a turmoil of uncertainty, fear and anguish regarding the fate of their loved one(s), public officials are said to maliciously lie to the family, with a view to punishing or intimidating them and others.¹¹

13. The Special Rapporteur would like to draw the attention of Governments to the views of the Human Rights Committee in *Maria del Carmen Almeida de Quinteros*, on behalf of her daughter, *Elena Quinteros Almeida*, and on her own behalf *v. Uruguay* — namely, that with regard to the violations alleged by the author on her own behalf, the Committee understands the anguish and uncertainty concerning the fate and whereabouts of her daughter. The author has the right to know what has happened to her daughter. In these respects, she too is a victim of the violations of the

Covenant suffered by her daughter, in particular, of article 7.

14. The Special Rapporteur notes that, according to both Committees, the rationale of duration has often been considered one of the principal elements in determining the severity of ill-treatment.¹² While reaffirming that enforced disappearances are unlawful under international law and cause much anguish, whatever their duration, the Special Rapporteur believes that to make someone disappear is a form of prohibited torture or ill-treatment, clearly as regards the relatives of the disappeared person and arguably in respect of the disappeared person or him/herself.¹³ He further believes that prolonged incommunicado detention in a secret place may amount to torture as described in article 1 of the Convention against Torture. The suffering endured by the disappeared persons, who are isolated from the outside world and denied any recourse to the protection of the law, and by their relatives doubtless increases as time goes by.

15. In the light of the above, the Special Rapporteur welcomes the decision of the Commission on Human Rights in its resolution 2001/46 (23 April 2001), entitled "Question of enforced or involuntary disappearances", to "appoint an independent expert to examine the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearance, taking into account relevant legal instruments at the international and regional levels, intergovernmental arrangements on judicial cooperation, the draft international convention on the protection of all persons from enforced disappearance (E/CN.4/Sub.2/1998/19, annex) transmitted by the Sub-Commission in its resolution 1998/25 of 26 August 1998, and also comments of States and intergovernmental and non-governmental organizations, with a view to identifying any gaps in order to ensure full protection from enforced or involuntary disappearance ...".

16. Finally, the Special Rapporteur would like to indicate his intention to continue to refrain from dealing with cases of disappearances so as to avoid duplication with the Working Group on Enforced or Involuntary Disappearances. He nevertheless hopes to be in a position to send joint communications with the Working Group, especially when fears have been expressed that the persons concerned may be at risk of torture and further disappearance in view of the

incommunicado nature of their detention in a secret place.

C. Torture and discrimination against sexual minorities

17. For some years, the Special Rapporteur has received information regarding a number of cases in which the victims of torture and other cruel, inhuman or degrading treatment or punishment have been members of sexual minorities. He notes that a considerable proportion of the incidents of torture carried out against members of sexual minorities suggests that they are often subjected to violence of a sexual nature, such as rape or sexual assault in order to "punish" them for transgressing gender barriers or for challenging predominant conceptions of gender roles.

18. The Special Rapporteur has received information according to which members of sexual minorities have been subjected, *inter alia*, to harassment, humiliation and verbal abuse relating to their real or perceived sexual orientation or gender identity and physical abuse, including rape and sexual assault.¹⁴ He notes with concern that, according to the information received, the rape of a man or of a male-to-female transsexual woman is often subject to the lesser charge of "sexual assault", which carries lighter penalties than the more serious crime of rape in a number of countries. It is also reported that male-to-female transsexual women have been beaten intentionally on their breasts and cheek-bones which had been enhanced by silicone implants, causing the implants to burst and as a result releasing toxic substances into their bodies. Ill-treatment against sexual minorities is believed to have also been used, *inter alia*, in order to make sex workers leave certain areas, in so-called "social cleansing" campaigns, or to discourage sexual minorities from meeting in certain places, including clubs and bars.

19. While no relevant statistics are available to the Special Rapporteur, it appears that members of sexual minorities are disproportionately subjected to torture and other forms of ill-treatment, because they fail to conform to socially constructed gender expectations. Indeed, discrimination on grounds of sexual orientation or gender identity may often contribute to the process of the dehumanization of the victim, which is often a necessary condition for torture and ill-treatment to take place. The Special Rapporteur further notes that

members of sexual minorities are a particularly vulnerable group with respect to torture in various contexts and that their status may also affect the consequences of their ill-treatment in terms of their access to complaint procedures or medical treatment in state hospitals, where they may fear further victimization, as well as in terms of legal consequences regarding the legal sanctions flowing from certain abuses. The Special Rapporteur would like to stress that, because of their economic and educational situation, allegedly often exacerbated or caused by discriminatory laws and attitudes, members of sexual minorities are deprived of the means to claim and ensure the enforcement of their rights, including their rights to legal representation and to obtain legal remedies, such as compensation.

20. The Special Rapporteur is concerned that in a number of countries laws punish consensual same-sex relationships and transgendered behaviour by corporal punishment which, as stated by the Commission on Human Rights on several occasions, "can amount to cruel, inhuman or degrading punishment or even to torture".¹⁵

21. Discriminatory attitudes to members of sexual minorities can mean that they are perceived as less credible by law enforcement agencies or not fully entitled to an equal standard of protection, including protection against violence carried out by non-State agents. The Special Rapporteur has received information according to which members of sexual minorities, when arrested for other alleged offences or when lodging a complaint of harassment by third parties, have been subjected to further victimization by the police, including verbal, physical and sexual assault, including rape. Silencing through shame or the threat by law enforcement officials to publicly disclose the birth sex of the victim or his or her sexual orientation (*inter alia*, to family members) may keep a considerable number of victims from reporting abuses.

22. Furthermore, the Special Rapporteur has received information according to which members of sexual minorities have received inadequate medical treatment in public hospitals — even after having been victims of assault — on grounds of their gender identity. As regards the provision of medical treatment, prisoners diagnosed as suffering from gender dysphoria, once detained, are often said to be denied medical treatment for gender dysphoria, such as hormone therapy.

23. When detained, members of sexual minorities are often considered as a sub-category of prisoners and detained in worse conditions of detention than the larger prison population. The Special Rapporteur has received information according to which members of sexual minorities in detention have been subjected to considerable violence, especially sexual assault and rape, by fellow inmates and, at times, by prison guards. Prison guards are also said to fail to take reasonable measures to abate the risk of violence by fellow inmates or even to have encouraged sexual violence, by identifying members of sexual minorities to fellow inmates for that express purpose. Prison guards are believed to use threats of transfer to main detention areas, where members of sexual minorities would be at high risk of sexual attack by other inmates. In particular, transsexual and transgendered persons, especially male-to-female transsexual inmates, are said to be at great risk of physical and sexual abuse by prison guards and fellow prisoners if placed within the general prison population in men's prisons.

24. The Special Rapporteur has received information according to which members of sexual minorities have been subject to cruel, inhuman or degrading treatment in non-penal institutions. In a number of countries, members of sexual minorities are said to have been involuntarily confined to state medical institutions, where they were allegedly subjected to forced treatment on grounds of their sexual orientation or gender identity, including electric shock therapy and other "aversion therapy", reportedly causing psychological and physical harm. The Special Rapporteur notes, in particular, that the World Health Organization removed homosexuality from its International Classification of Diseases-10 (ICD-10) in 1992. The Special Rapporteur has received information according to which, in a number of countries, persons suspected of homosexuality have been subjected to compulsory, intrusive and degrading medical examinations of anus and penis in order to determine whether penetration had taken place, *inter alia*, within the context of enlistment for military service.

25. Finally, the Special Rapporteur notes and shares the views of the Special Representative of the Secretary-General on human rights defenders regarding "greater risks ... faced by defenders of the rights of certain groups as their work challenges social structures, traditional practices and interpretation of religious precepts that may have been used over long

periods of time to condone and justify violation of the human rights of members of such groups. Of special importance will be ... human rights groups and those who are active on issues of sexuality, especially sexual orientation ... These groups are often very vulnerable to prejudice, to marginalization and to public repudiation, not only by State forces but other social actors."¹⁶

D. Torture and impunity

26. The Special Rapporteur has noted in the past that the single most important factor in the proliferation and continuation of torture is the persistence of impunity, be it of a *de jure* or *de facto* nature. Causes of impunity of a *de jure* nature encompass measures relieving perpetrators of torture of legal liability, *inter alia*, by providing an unrealistically short period of prescription, adopting acts of impunity or by granting amnesties to perpetrators of grave violations of human rights. It is with regard to the granting of amnesties that the Special Rapporteur wishes to review the recent developments in international law on the question of the compatibility of amnesties with States' international obligations to combat torture.

27. The Special Rapporteur would like to draw Governments' attention to the Vienna Declaration and Programme of Action, which stipulates that "States should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law".¹⁷ The Special Rapporteur further notes the report "Question of the impunity of perpetrators of human rights violations (civil and political)", prepared by Mr. Louis Joinet of the Subcommission on Prevention of Discrimination and Protection of Minorities, pursuant to Subcommission decision 1996/119, which states that "amnesty cannot be accorded to perpetrators of violations before the victims have obtained justice by means of an effective remedy" and that "the right to justice entails obligations for the State: to investigate violations, to prosecute the perpetrators and, if their guilt is established, to punish them".¹⁸ As requested by the Subcommission in its decision 1996/119, Mr. Joinet drafted a set of principles for the protection and promotion of human rights through action to combat impunity,¹⁹ in which he states that "there can be no just and lasting reconciliation unless the need for justice is effectively justified" and that "national and

international measures must be taken ... with a view to securing jointly, in the interests of the victims of human rights violations, observance of the right to know and, by implication, the right to the truth, the right to justice and the right to reparation, without which there can be no effective remedy against the pernicious effects of impunity". The Set of Principles further states that "even when intended to establish conditions conducive to a peace agreement or to foster national reconciliation, amnesty and other measures of clemency shall be kept within the following bounds: (a) the perpetrators of serious crimes under international law may not benefit from such measures until such time as the State has met" their "obligations to investigate violations, to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that they are prosecuted, tried and duly punished, to provide victims with effective remedies and reparation for the injuries suffered, and to take acts to prevent the recurrence of such violations".²⁰

28. The Special Rapporteur wishes to stress the duty of States to bring to justice perpetrators of torture as an integral part of the victims' right to reparation, as noted by Mr. Joinet, of the Subcommission on Prevention of Discrimination and Protection of Minorities, and the last independent expert of the Commission on Human Rights on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Mr. M. Cherif Bassiouni, in their reports²¹ and in the Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law.²² In his final report, Mr. Bassiouni revised the basic principles and guidelines, holding that the victim's right to a remedy encompasses (a) access to justice; (b) reparation for the harm suffered; and (c) access to factual information concerning the violations.²³ He furthermore stated that "violations of international human rights and humanitarian law norms that constitute crimes under international law carry the duty to prosecute persons alleged to have committed these violations, to punish perpetrators adjudged to have committed these violations, and to cooperate with and assist States and appropriate international judicial organs in the investigation and prosecution of these violations".²⁴

29. The Special Rapporteur further wishes to refer to the jurisprudence of the Human Rights Committee,

which, in its General Comment 20, of 3 April 1992, on the prohibition of torture, concluded that amnesties are generally incompatible with the duty of States to investigate such acts of torture; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in future. In the case of *Hugo Rodríguez v. Uruguay*, the Committee reaffirmed its position that amnesties for gross violations of human rights are incompatible with the obligations of the State party under the Covenant and expressed concern that in adopting the amnesty law in question, the State party has contributed to an atmosphere of impunity which may undermine the democratic order and give rise to further human rights violations. The Special Rapporteur notes that, in its conclusions and recommendations following the review of the third periodic report of Peru, the Committee against Torture expressed concern about "the use of, in particular, the amnesty laws which preclude prosecution of alleged torturers who must, according to articles 4, 5 and 12 of the Convention, be investigated and prosecuted where appropriate"²⁵ and recommends that "amnesty laws should exclude torture from their reach".²⁶

30. The Special Rapporteur notes the extensive jurisprudence developed by the Inter-American Commission and Court of Human Rights on the question of amnesty legislation. The Inter-American Commission on Human Rights has condemned amnesty laws issued by democratic successor Governments in the name of reconciliation, even if approved by a plebiscite, and has held them to be in breach of the 1969 American Convention on Human Rights, in particular the duty of the State to respect and ensure rights recognized in the Convention (article 1(1)), the right to due process of law (article 8) and the right to an effective judicial remedy (article 25). The Commission held further that amnesty laws extinguishing both criminal and civil liability disregarded the legitimate rights of the victims' next of kin to reparation and that such measures would do nothing to further reconciliation. The Commission held that, as regards countries that had not ratified the American Convention on Human Rights at the time of the perpetration of human rights violations subject to the amnesty laws, the violations were incompatible with article XVIII (right to a fair trial) and with the above-mentioned provisions of the American Convention.²⁷ Finally, the Commission clarified that new democratic Governments bear responsibility for the human rights violations of previous (military)

regimes, in accordance with the principle of the State's continuing responsibility in international law, and hence for the non-revocation of a self-amnesty law, promulgated by a previous military dictatorship.²⁸

31. The Special Rapporteur would like to draw the attention of the General Assembly to a recent judgement of the Inter-American Court of Human Rights, *Caso Barrios Altos, Chumbipuma Aguirre y otros v. Perú* (14 March 2001). The Court held that amnesty provisions, prescription and the exclusion of responsibility which have the effect of impeding the investigation and punishment of those responsible for grave violations of human rights, such as torture, summary, extrajudicial or arbitrary executions, and enforced disappearances, are prohibited as contravening human rights of a non-derogable nature recognized by international human rights law. The Court considered the laws in question to be in violation of the duty on the State to give domestic legal effect to the rights contained in the Convention (article 2). The Court held further that the self-amnesty laws lead to the victims' defencelessness and to the perpetuation of impunity, and, for this reason, were manifestly incompatible with the letter and spirit of the Convention. The Court concluded by stating that as a consequence of the manifest incompatibility of the self-amnesty laws with the Inter-American Convention on Human Rights, the laws concerned have no legal effect and may not continue representing an obstacle to the investigation of the facts of the case, nor for the identification and punishment of those responsible.

32. The Special Rapporteur would also like to draw the attention of the General Assembly to the fact that, in conjunction with the Special Rapporteurs on extrajudicial, summary or arbitrary executions and on the independence of judges and lawyers, and with the Chairman of the Working Group on Enforced or Involuntary Disappearances, he had sent a communication to the Government of Peru regarding the amnesty laws promulgated in June and July 1995. The Special Rapporteurs considered, *inter alia*, that those laws denied the right to an effective remedy for victims of human rights violations and, therefore, were contrary to the spirit of various international human rights instruments.²⁹

33. In the light of the consistent international jurisprudence suggesting that the prohibition of amnesties leading to impunity for serious human rights has become a rule of customary international law, the

Special Rapporteur expresses his opposition to the passing, application and non-revocation of amnesty laws (including laws in the name of national reconciliation, the consolidation of democracy and peace, and respect for human rights), which prevent torturers from being brought to justice and hence contribute to a culture of impunity. As before, he calls on States to refrain from granting or acquiescing in impunity at the national level, *inter alia*, by the granting of amnesties, such impunity itself constituting a violation of international law.

E. Prevention and transparency

34. The Special Rapporteur would like to reiterate³⁰ that one of the main factors constituting a condition of impunity is the prevalence of the opportunity to commit the crime of torture in the first place. This is why international standards require that the length of incommunicado detention be restricted to hours rather than days, that lawyers, physicians and family members have prompt access to detainees, and that detainees have early access to the judicial system. As stated on several occasions, the Special Rapporteur also recommends external supervision of all places of detention by independent officials, such as judges, prosecutors, ombudsmen and national or human rights commissions, and by civil society. He also recommends the video-recording of interrogation sessions and the presence of the person's lawyer at such sessions, and supports monitoring by independent monitoring institutions, such as the International Committee of the Red Cross and the Committee on the Prevention of Torture under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and the mechanism contemplated by the draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, should it be adopted with at least the powers enjoyed by the two mechanisms referred to above.

35. The Special Rapporteur is convinced that there needs to be a radical transformation of assumptions in international society about the nature of deprivation of liberty. The basic paradigm, taken for granted over at least a century, is that prisons, police stations and the like are closed and secret places, with activities inside hidden from public view. The international standards referred to are conceived of as often unwelcome

exceptions to the general norm of opacity, merely the occasional ray of light piercing the pervasive darkness. What is needed is to replace the paradigm of opacity by one of transparency. The assumption should be one of open access to all places of deprivation of liberty. Of course, there will have to be regulations to safeguard the security of the institution and individuals within it, and measures to safeguard their privacy and dignity. But those regulations and measures will be the exception, having to be justified as such; the rule will be openness.

36. This proposed reversal of our conceptions is, of course, motivated by a desire to prevent human rights violations within the Special Rapporteur's mandate, and the Special Rapporteur expects that it will give rise to doubts and misgivings, especially among law enforcement and penitentiary authorities. It is his belief, however, that the approach he is proposing could also be of great value precisely to such authorities. In the first place it would help some authorities develop a constituency to support the granting of needed budgetary resources, frequently wholly inadequate because of the low political priority for the area. The same constituency could help resist the usually counter-productive demand to put more and more people into the human equivalent of dust bins, their custodians being reduced to the status of guardians of human rubbish dumps. It could draw attention to the often parlous conditions of work, residence and sustenance of police and prison personnel, which in turn could contribute to their being trained, paid and valued to act as professionals. Organizations of civil society could also help in the provision of resources, for example, by way of food, goods, medication, legal advice, education and so on. Further, all of this would make false accusations of abuse — always difficult to refute — much harder to sustain.

37. The kinds of access implicit in this conception are not in themselves novel. The Special Rapporteur has encountered different manifestations of it in all parts of the world, but usually on an ad hoc or localized basis in some prisons or police stations. They are generally the exception, not the rule. The Special Rapporteur notes also that architecture will have an important role to play.

38. Accordingly, while urging serious national and international attention to the need to overcome impunity by ensuring individual accountability, the

Special Rapporteur also recommends measures of transparency that could go far to preventing torture and ill-treatment in the first place.

F. Recommendations

39. In his last report to the Commission on Human Rights (E/CN.4/2001/66) the Special Rapporteur revised the recommendations that he had compiled in 1994 (E/CN.4/1995/34) into one global recommendation — an end to de facto or de jure impunity. He would like to encourage States to reflect upon them as a useful tool in efforts to combat torture. A further revised version of the recommendations follows:

(a) Countries that are not party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment or the International Covenant on Civil and Political Rights should sign and ratify or accede to these Conventions. Torture should be designated and defined as a specific crime of the utmost gravity in national legislation. In countries where the law does not give the authorities jurisdiction to prosecute and punish torture, wherever the crime has been committed and whatever the nationality of the perpetrator or victim (universal jurisdiction), the enactment of such legislation should be made a priority;

(b) Countries should sign and ratify or accede to the Rome Statute of the International Criminal Court with a view to bringing to justice perpetrators of torture in the context of genocide, crimes against humanity and war crimes and at the same time ensure that their national courts also have jurisdiction over these crimes on the basis of universal jurisdiction;

(c) The highest authorities should publicly condemn torture in all its forms whenever it occurs. The highest authorities, in particular those responsible for law enforcement activities, should make public the fact that those in charge of places of detention at the time abuses are perpetrated will be held personally responsible for the abuses. In order to give effect to these recommendations, the authorities should, in particular, make unannounced visits to police stations, pre-trial detention facilities and penitentiaries known for the prevalence of such treatment. Public campaigns aimed at informing the civilian population at large of their rights with respect to arrest and detention, in

particular to lodge complaints regarding treatment received at the hands of law enforcement officials, should be undertaken;

(d) Interrogation should take place only at official centres and the maintenance of secret places of detention should be abolished under law. It should be a punishable offence for any official to hold a person in a secret and/or unofficial place of detention. Any evidence obtained from a detainee in an unofficial place of detention and not confirmed by the detainee during interrogation at official locations should not be admitted as evidence in court. No statement of confession made by a person deprived of liberty, other than one made in presence of a judge or a lawyer, should have a probative value in court, except as evidence against those who are accused of having obtained the confession by unlawful means. Serious consideration should be given to introducing video- and audio-taping of proceedings in interrogation rooms;

(e) Regular inspection of places of detention, especially when carried out as part of a system of periodic visits, constitutes one of the most effective preventive measures against torture. Independent non-governmental organizations should be authorized to have full access to all places of detention, including police lock-ups, pre-trial detention centres, security service premises, administrative detention areas and prisons, with a view to monitoring the treatment of persons and their conditions of detention. When inspection occurs, members of the inspection team should be afforded an opportunity to speak privately with detainees. The team should also report publicly on its findings. In addition, official bodies should be set up to carry out inspections, such teams being composed of members of the judiciary, law enforcement officials, defence lawyers and physicians, as well as independent experts and other representatives of civil society. Ombudsmen and national or human rights institutions should be granted access to all places of detention with a view to monitoring the conditions of detention. When it so requests, the International Committee of the Red Cross should be granted access to places of detention;

(f) Torture is most frequently practised during incommunicado detention. Incommunicado detention should be made illegal, and persons held incommunicado should be released without delay. Information regarding the time and place of arrest as well as the identity of the law enforcement officials

having carried out the arrest should be scrupulously recorded; similar information should also be recorded regarding the actual detention. Legal provisions should ensure that detainees are given access to legal counsel within 24 hours of detention. Security personnel who do not honour such provisions should be punished. In exceptional circumstances, under which it is contended that prompt contact with a detainee's lawyer might raise genuine security concerns and where restriction of such contact is judicially approved, it should at least be possible to allow a meeting with an independent lawyer, such as one recommended by a bar association. In all circumstances, a relative of the detainee should be informed of the arrest and place of detention within 18 hours. At the time of arrest, a person should undergo a medical inspection, and medical inspections should be repeated regularly and should be compulsory upon transfer to another place of detention. Each interrogation should be initiated with the identification of all persons present. All interrogation sessions should be recorded and preferably video-recorded, and the identity of all persons present should be included in the records. Evidence from non-recorded interrogations should be excluded from court proceedings. The practice of blindfolding and hooding often makes the prosecution of torture virtually impossible, as victims are rendered incapable of identifying their torturers. Thus, blindfolding or hooding should be forbidden. Those legally arrested should not be held in facilities under the control of their interrogators or investigators for more than the time required by law to obtain a judicial warrant of pre-trial detention which, in any case, should not exceed a period of 48 hours. They should accordingly be transferred to a pre-trial facility under a different authority at once, after which no further unsupervised contact with the interrogators or investigators should be permitted;

(g) Administrative detention often puts detainees beyond judicial control. Persons under administrative detention should be entitled to the same degree of protection as persons under criminal detention. At the same time, countries should consider abolishing, in accordance with relevant international standards, all forms of administrative detention;

(h) Provisions should give all detained persons the ability to challenge the lawfulness of the detention — e.g., through *habeas corpus* or *amparo*. Such procedures should function expeditiously;

(i) Countries should take effective measures to prevent prisoner-on-prisoner violence by investigating reports of such violence, prosecuting and punishing those responsible, and offering protective custody to vulnerable individuals, without marginalizing them from the prison population more than necessitated by the needs of protection and without rendering them at further risk of ill-treatment. Training programmes should be considered to sensitize prison officials as to the importance of taking effective steps to prevent and remedy prisoner-on-prisoner abuse and to provide them with the means to do so. In accordance with the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,³¹ prisoners should be segregated along the lines of gender, age and seriousness of the crime, as well as first-time/repeat offenders and pre-trial/convicted detainees;

(j) When a detainee or relative or lawyer lodges a torture complaint, an inquiry should always take place and, unless the allegation is manifestly ill-founded, public officials involved should be suspended from their duties pending the outcome of the investigation and any subsequent legal or disciplinary proceedings. Where allegations of torture or other forms of ill-treatment are raised by a defendant during trial, the burden of proof should shift to the prosecution to prove beyond reasonable doubt that the confession was not obtained by unlawful means, including torture and similar ill-treatment. Serious consideration should also be given to the creation of witness protection programmes for witnesses to incidents of torture and similar ill-treatment which ought to extend fully to cover persons with a previous criminal record. In cases where current inmates are at risk, they ought to be transferred to another detention facility where special measures for their security should be taken. A complaint that is determined to be well founded should result in compensation to the victim or relatives. In all cases of death occurring in custody or shortly after release, an inquiry should be held by judicial or other impartial authorities. A person in respect of whom there is credible evidence of responsibility for torture or severe maltreatment should be tried and, if found guilty, punished. Legal provisions granting exemptions from criminal responsibility for torturers, such as amnesties, indemnity laws etc., should be abrogated. If torture has occurred in an official place of detention, the official in charge of that place should be disciplined or punished. Military tribunals should not be used to try persons accused of torture. Independent national

authorities, such as a national commission or ombudsman with investigatory and/or prosecutorial powers, should be established to receive and to investigate complaints. Complaints about torture should be dealt with immediately and should be investigated by an independent authority with no relation to that which is investigating or prosecuting the case against the alleged victim. Furthermore, the forensic medical services should be under judicial or other independent authority, not under the same governmental authority as the police and the penitentiary system. Public forensic medical services should not have a monopoly of expert forensic evidence for judicial purposes. In that context, countries should be guided by the Principles on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment as a useful tool in the effort to combat torture;³²

(k) Training courses and training manuals should be provided for police and security personnel and, when requested, assistance should be provided by the United Nations programme of advisory services and technical assistance. Security and law enforcement personnel should be instructed on the Standard Minimum Rules for the Treatment of Prisoners,³³ the Code of Conduct for Law Enforcement Officials,³⁴ the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,³⁵ and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,³¹ and these instruments should be translated into the relevant national languages. In the course of training, particular stress should be placed upon the principle that the prohibition of torture is absolute and non-derogable and that there exists a duty to disobey orders from a superior to commit torture. Governments should scrupulously translate into national guarantees the international standards they have approved and should familiarize law enforcement personnel with the rules they are expected to apply;

(l) Health-sector personnel should be instructed on the Principles of Medical Ethics relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Detainees and Prisoners against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.³⁶ Governments and professional medical associations should take strict measures against medical personnel that play a role, direct or indirect, in

torture. Such prohibition should extend to such practices as examining detainees to determine their "fitness for interrogation" and procedures involving ill-treatment or torture, as well as providing medical treatment to ill-treated detainees so as to enable them to withstand further abuse. In other cases, the withholding of appropriate medical treatment by medical personnel should be subject to sanction.

Notes

¹ See E/CN.4/2001/66, paras. 4-11.

² *Ibid.*, para. 115.

³ See, in particular, E/CN.4/1998/38/Add.2, on the visit of the Special Rapporteur to Mexico, and E/CN.4/2001/66/Add.2, on the visit of the Special Rapporteur to Brazil.

⁴ General Assembly resolution 47/133 of 18 December 1992.

⁵ The third preambular para. of the Declaration describes "enforced disappearance" in the sense that "persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law".

⁶ E/CN.4/1983/14, para. 131.

⁷ See, for example, conclusions and recommendations on the second periodic report of Algeria (A/52/44, para. 79), on the initial report of Namibia (A/52/44, para. 247) and on the initial report of Sri Lanka (A/53/44, paras. 249 and 251).

⁸ CCPR/C/50/D/440/1990 (24 March 1994), para. 5.4.

⁹ For further discussion on the case-law regarding "disappearance" as torture, see Nigel Rodley, *The Treatment of Prisoners in International Law*, 2nd ed. (Oxford, Clarendon Press, 1999), pp. 257-261.

¹⁰ Article 7 (Crimes against humanity) of the Rome Statute of the International Criminal Court (17 July 1998) defines "enforced disappearance of persons" as "the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons,

with the intention of removing them from the protection of the law for a prolonged period of time".

¹¹ See, in particular, Amnesty International, *Enforced Disappearances and Political Killings: Human Rights Crises in the 1990s: A Manual for Action* (AI Index: ACT 33/01/94).

¹² "... the assessment of what constitutes inhuman or degrading treatment falling within the meaning of article 7 depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical and mental effects as well as the sex, age and state of health of the victim". Human Rights Committee, *Antti Voulanne v. Finland* (A/44/40), chap. X, sect. J, para. 9.2.

¹³ See Nigel Rodley, *op. cit.*, p. 261.

¹⁴ See, in particular, Amnesty International, "Crimes of hate, conspiracy of silence: Torture and ill-treatment based on sexual identity" (ACT 40/016/2001).

¹⁵ See, *inter alia*, resolution 2001/62 of 25 April 2001, para. 5.

¹⁶ E/CN.4/2001/94, para. 89 (g).

¹⁷ A/CONF.157/23 (25 July 1993), para. 60.

¹⁸ E/CN.4/Sub.2/1997/20/Rev.1, paras. 32 and 27.

¹⁹ *Ibid.*, annex II.

²⁰ *Ibid.*, principles 25 and 18.

²¹ "Question of the impunity of perpetrators of human rights violations (civil and political)" (E/CN.2/Sub.2/1997/20/Rev.1) and "Report of the independent expert on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms ..." (E/CN.4/1999/65).

²² E/CN.4/Sub.2/1996/17, annex.

²³ E/CN.4/2000/62, annex, para. 11.

²⁴ *Ibid.*, para. 4.

²⁵ A/55/44, para. 59 (g).

²⁶ *Ibid.*, para. 61 (d).

²⁷ "Annual report of the Inter-American Commission on Human Rights, 1992-1993" (OEA/Ser.L/V/II.83, 12 March 1993), p. 51.

²⁸ See Case No. 10,843 (*Héctor Marcial Garay Hermosilla y otros v. Chile*) in "Annual report of the Inter-American Commission on Human Rights, 1996".

²⁹ See E/CN.4/1996/35, para. 133.

³⁰ See also conclusions and recommendations in E/CN.4/2001/66, paras. 1,307-1,316.

³¹ General Assembly resolution 43/173, annex.

³² See General Assembly resolution 55/89, annex.

³³ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 1955.

³⁴ General Assembly resolution 34/169, annex.

³⁵ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 1990.

³⁶ General Assembly resolution 37/194, annex.
